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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1176

UNION PACIFIC RAILROAD COMPANY, A CORPORATION

Petitioner.

vs.

CHARLOTTE E. LEET, ADMINISTRATRIX OF THE ESTATE OF HAROLD PATRICK UTTERBACK, DECEASED

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

E. E. BENNETT,
EDWARD C. RENWICK,
MALCOLM DAVIS,
Counsel for Petitioner.
THOMAS W. BOCKES,
Of Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Union Pacific Railroad Company, a corporation, respectfully petitions this Honorable Court to issue a writ of certiorari to review the judgment of the Supreme Court of the State of California in the above entitled cause.

Petitioner respectfully shows:

A. Jurisdiction

(a) The statutory provision sustaining the jurisdiction of this Court in this cause is Section 237(b) of the

Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937, United States Code, Title 28, Section 344(b), the federal question involved being the interpretation of the venue provision of the Federal Empoyers' Liability Act, 45 U. S. Code, Sec. 56.

(b) The date of entry of the judgment of the Supreme Court of California here sought to be reviewed is January 25, 1945. Said judgment is the final judgment of that Court, which is the highest court in the State of California in which a decision of said matter could be had. This petition for writ of certiorari, supporting brief, and the record in said cause are being filed in this court within three months after the entry of said final judgment.

B. Statutes Involved

This case arises under the Federal Employers' Liability Act (United States Code, Title 45, Sections 51-59).

C. Question Presented

The question presented is whether the Supreme Court of California erred in deciding that the courts of that state have been deprived by the venue provisions of the Federal Employers' Liability Act of all power to decline jurisdiction of a case brought under the Federal Employers' Liability Act by a resident of Oregon against a Utah railroad corporation doing business in California, where the accident involved occurred in Oregon, decedent and his heirs resided in Oregon, all the witnesses resided in Oregon, and none of the witnesses could be brought to testify personally at the trial in California without serious interference with interstate commerce.

D. Summary Statement of the Matter Involved

Harold Patrick Utterback, while employed as a fireman on one of petitioner's freight trains was killed in an acci-

dent which occurred near Portland in Multnomah County, Oregon, on February 7, 1942. All witnesses to the accident, which involved two trains, resided in or near Portland. Mr. Utterback and his widow and children, for whose benefit the action was instituted, also resided in Portland.

Union Pacific Railroad Company, petitioner, is a corporation of the State of Utah. At the time of the accident and at the present time petitioner carried on its business as a carrier of freight and passengers for hire in the States of Oregon, California, Utah and other states.

At all pertinent times there were open and functioning within the State of Oregon regularly constituted courts, both state and federal, of original and general jurisdiction, which were conveniently available for the prompt and effective enforcement of any meritorious claim against petitioner arising out of said accident. The above action was instituted April 27, 1942, in the Superior Court of the State of California in and for the County of Los Angeles. In due course petitioner filed its motion to abate the said proceedings on the ground that it could not properly defend itself in the California damage action without withdrawing from railroad service for a week or more a large number of its employees who could not be replaced by others because of labor shortages; that by direction of the government petitioner was engaged in transporting large numbers of troops and vast quantities of vital war material, the prompt movement of which was essential to the prosecution of the war; that to handle such emergency war traffic and other traffic, petitioner was compelled to work all of its train service employees, most of them overtime, and some of them on double shifts; that the withdrawal of one or more train crews from active service for use as witnesses in the California case would interrupt the physical operation of some of petitioner's trains; and that in these circumstances the prosecution of the case in California would require peti-

tioner either to violate its paramount obligation to the government and the public in the transportation of interstate commerce or to waive its constitutional right to present properly its defense in said case. The motion was supported by affidavits verifying all the pertinent facts. No counter-affidavits were filed.

The motion was denied on the ground that the court had no power to refuse jurisdiction in view of what the trial court felt to be the interpretation of the venue provision of the Federal Employers' Liability Act in the case of *Miles* vs. *Illinois Central R. Co.*, 315 U. S. 698.

A subsequent motion for the continuance of the trial until such time as witnesses could be brought from Oregon to Los Angeles without interfering with the transportation of interstate commerce was also denied, on the ground that since the court was bound to entertain jurisdiction of the case, it was likewise bound to try it expeditiously.

The case thereupon went to trial and evidence was introduced on the part of respondent, both by the personal testimony of witnesses and by deposition. The defendant called no witnesses, merely presenting evidence that no witnesses could be produced in person for the reasons above set forth. The jury brought in a verdict for respondent in the amount of $30,000.00.

Petitioner appealed to the District Court of Appeal of California. That court affirmed the judgment of the Superior Court.

Respondent then petitioned for a hearing of the cause by the Supreme Court of California. This was granted, thereby vacating the proceedings before the District Court of Appeal, and in due time the said Supreme Court in a four-to-three decision affirmed the judgment below, holding that the Superior Court was without power to abate the proceedings or to continue the same indefinitely, no matter what equitable considerations might exist therefor. The

Court regarded the venue provision of the Federal Employers' Liability Act as constituting a mandate by Congress that any state court having competent general jurisdiction appropriate to the purpose must entertain actions brought under the Federal Act, in spite of the existence of reasons which otherwise would require abatement of the proceedings.

Petitioner then petitioned for a rehearing, but although three of the Justices voted for it, rehearing was denied on January 25, 1945.

On proper application the Supreme Court of California entered an order staying the issuance of remittitur until further order of that court.

E. Reasons Relied On for Issuance of Writ

Petitioner submits that this court should review the said decision of the Supreme Court of the State of California for the following reason:

The California Court decided a federal question in a way probably not in accord with applicable decisions of this Court. It held that the venue provision of the Federal Employers' Liability Act is an absolute command by Congress that a state court must entertain jurisdiction of an action brought under the Act, if the carrier is doing business within that state, in spite of the existence of facts and circumstances which otherwise would require the abatement of the proceedings. That decision is probably not in accord with the decisions of this court in such cases as *Michigan Central R. Co.* v. *Mix,* 278 U. S. 492, 73 L. ed. 470; *Douglas* v. *N. Y., N. H. & H. R. Co.,* 279 U. S. 337, 73 L. ed. 747; *Miles* v. *Ill. Central R. Co.,* 315 U. S. 698 (dissenting opinion and concurring opinion of Mr. Justice Jackson); 86 L. Ed. 1129; *Herb* v. *Pitcairn,* decided Feb. 5, 1945, L. ed. Adv. Op., Vol. 89, p. 481.

Prayer

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued by this Honorable Court, directed to the Supreme Court of the State of California, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and proceedings in the case entitled on its docket, "Charlotte E. Leet, Administratrix of the Estate of Harold Patrick Utterback, Deceased, Plaintiff and Respondent, vs. Union Pacific Railroad Company, a corporation, Defendant and Appellant, Los Angeles No. 18.954", and that the court review and decide the said questions presented and reverse the judgment of the Supreme Court of the State of California entered in said cause, and that petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated at Los Angeles, California, March 29, 1945.

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